SUPREME COURT, U. S.

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No. 489

In the

Supreme Court of the United States

OCTOBER TERM, 1969.

L. C. SHELTON, AMERICO DETRES, SR., as father and natural guardian of AMERICO, JR., a minor,

Petitioners,

vs.

CITY OF CHICAGO, a Municipal corporation and COUNTY OF COOK, a body politic and corporate,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Illinois, entered in the above-entitled case on May 28, 1969.

CITATIONS TO OPINIONS BELOW

The opinion of the trial judge (R. 59-99) is unreported and is printed in appendix B hereto, *infra,* p. 11a. The opinion of the Supreme Court of Illinois (R. 400-405) printed in appendix B hereto, *infra,* p. 4a, is reported at 248 N.E.2d 121 and is not published in the Illinois Reporter as of the filing of this petition.

JURISDICTION

The Supreme Court of Illinois rendered its opinion reversing the trial Court with directions to dismiss on May 28, 1969, (R. 400-405, appendix, *infra*, pp. 4a-10a). The Federal Constitutional question was first raised in the trial court in the manner detailed in the statement of the case, *infra*, p. 3. The justice who delivered the Illinois Supreme Court's opinion has certified that a Federal Constitutional question was raised, and that it was material to the issues and necessarily passed upon. The certificate is set forth *infra* at p. 6. The mandate of the Illinois Supreme Court has been stayed pending final disposition of the petition for certiorari. (R. 10-11).

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment prohibits the retroactive application of the repeal of the Mob Violence Statutes to defeat causes of action against the City of Chicago and County of Cook arising prior to the enactment of the repeal.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Statutory provisions involved are Ill.Rev.Stat. 1965, Ch. 38 §25-3 [County Liability Act]; Ill.Rev.Stat. 1965, Ch. 24 §1-4-8 [City Liability Act]; Laws of Illinois 1967, Vol. 2 p. 2365 [Repeals County Statute]; and Laws of Illinois 1967, Vol. 2 p. 3286 [Repeals City Statutes]. These Acts are set out in full in appendix A, *infra*, pp. 1a-3a. Also set out is Ill.Rev.Stat. 1965, Ch. 38 §25-1 which contains the definition of Mob Action incorporated by reference into the above statutes. The federal question is based upon the Due Process Clause of the Fourteenth Amendment.

STATEMENT

The Petitioners filed separate suits for damages in the Circuit Court of Cook County, Illinois based upon the "Mob Violence Statutes" (Ill.Rev.Stat. 1965, Ch. 24 §1-4-8 and Ch. 38 §25-3) naming the City of Chicago and County of Cook as defendants. The Mob Violence Statutes grant an action against the City and/or County for personal injuries or material damage to property caused by Mob Action and contain a $30,000 limitation. The statutes were first enacted in 1887. Laws of Illinois, 1887, p. 237. The separate actions of the Petitioners were consolidated in the trial court for purposes of appeal. (R. 101-103)

The Shelton Complaint, filed on October 8, 1966, seeks damages for the loss of plaintiff's leg, caused by a gunshot wound when he was escorting two of his children up the front stairway of his residence at 1511 South Kedzie Avenue in Chicago, Illinois on July 14, 1966. (R. 18-28). The Detres Complaint, filed on November 10, 1966 and amended on January 11, 1967, seeks damages for the loss of the use of an eye by a minor when a car in which he was a passenger was set upon by a mob near the intersection of Harrison and Sacramento Streets in Chicago, Illinois on July 15, 1966 (R. 29, 35-41). On July 31, 1968 and August 21, 1968, one year after these actions arose and nine months after suits were filed, the portions of the Mob Violence Statutes granting a right of recovery were repealed. Laws of Illinois 1967, Vol. 2, p. 2365 and 3286, appendix *infra*, p. 3a. Both the City of Chicago and County of Cook filed motions to dismiss, alleging in part that the repeals extinguished the present actions. (R. 42-44, 47-49, 52-57) The trial judge issued a lengthy opinion (R. 59-99, appendix *infra*, pp. 11a-46a) denying

the motions. (R. 113-116) The defendants then filed motions to certify the question for appeal setting forth that over two hundred suits for Mob Violence were pending, and that the total *ad damnums* exceeded four million dollars. (R. 105-110) The trial judge certified the existence of substantial grounds for difference of opinion and the desirability of obtaining an immediate appeal. (R. 113-116) The Illinois Appellate Court granted the Petition for Leave to Appeal, and on motion the Illinois Supreme Court transferred the appeal to itself as a case of extraordinary importance. (R. 2, 400).

The Illinois Supreme Court reversed the trial court with directions to dismiss the Complaints (R. 400-405), rejecting the plaintiffs' contention that their rights could not, as a matter of constitutional law, be retroactively defeated. (R. 403)

Manner In Which The Federal Question Was Raised and Decided Below

The deprivation of a constitutional right did not occur until the Illinois Supreme Court granted defendants' Motions, but the issue was raised from the outset. In the trial court, plaintiffs filed a Memorandum in Opposition to defendants' Motions and claimed that to apply the repeals retrospectively to the plaintiffs would violate their rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Constitutional claim was set up in part as follows: "It is plaintiffs' belief that such a contention [retroactive effect of repeal] is . . . contrary to the Due Process Clause of the Federal and State Constitutions." (R. 184) Further on, the plaintiffs set forth the Due Process Clause of the Fourteenth Amendment in *haec verba* (R. 187) and

stated: "Plaintiffs rely upon . . . the Due Process provisions in both the United States Constitution and Illinois Constitution." (R. 187) Plaintiffs cited decisions by this Court describing Due Process (R. 192, 194-195), and in conclusion requested that the defendants' Motions "be denied as contrary to the Constitution of . . . the United States." (R. 200) In his opinion, the trial judge stated: "[T]his Court concludes that the causes of action that accrued in July, 1966 were vested rights protected by constitutional guarantees." (R. 83)

The constitutional issue was also raised by plaintiffs as Point II in their Brief filed with the Illinois Supreme Court as follows (R. 299, 324-327):

> "Under the Due Process Clause of both the Illinois Constitution and the United States Constitution, the plaintiffs have acquired rights which cannot be taken away by retroactive legislation."

The first paragraph of the Fourteenth Amendment to the Constitution was set up in full in that portion of the brief detailing constitutional provisions involved. (R. 295) The opinion of the Supreme Court decided the constitutional question adversely to the Petitioners. To remove any uncertainty which could possibly exist, the Justice of the Illinois Supreme Court who rendered the opinion of the Court[1] certified that the constitutional question was material to the issues and necessarily passed upon by the Court as follows:

> "IT IS HEREBY ORDERED TO BE CERTIFIED and made a part of the record that the Plaintiffs in

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[1] The Illinois Supreme Court is recessed until September, and since the decision, two Justices have retired. A third did not participate in the deliberation or decision.

this Appeal both in their brief and on oral argument claimed a right under the Fourteenth Amendment of the Constitution of the United States, and in particular claimed that the Due Process Clause of the Fourteenth Amendment prohibits the retrospective application of a repeal to defeat causes of action for Mob Action arising prior to the enactment of the repeal which claim was material to the determination of this case and necessarily passed upon by the Supreme Court of Illinois, and which was determined adversely to the Plaintiffs-Appellees." (Addl R. 2)[2]

[2]Petitioners believe that either certiorari or appeal is a proper method of review in this case but have proceeded by way of certiorari because of the manner in which the constitutional question has been previously framed, and in accordance with *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 717 (1960).

REASONS FOR GRANTING THE WRIT

I.

Petitioners Were Deprived of a Substantial Right Without Redress Contrary to the Requirements of Due Process as stated In Decisions of This Court

Petitioners' rights arose in July, 1966 during the occurrence of mob violence. The rights were set forth in a statute of the State of Illinois which provided in part:

> "Any person suffering material damage to property injury to persons . . . as a result of any of the following unlawful activities shall have an action against the city [and/or county] . . ." Ill.Rev.Stat. 1965, Ch. 24 §1-4-8 and Ch. 38 §25-3

Mob Action was among the listed unlawful activities. As of July, 1966, the Petitioners possessed "an action", that is, a right to recover against the City of Chicago and County of Cook. Petitioners question the power of the State Legislature to retroactively extinguish their right.

The Court established a guide for examination of the retroactivity of state legislative action in *Gibbes* v. *Zimmerman*, 290 U.S. 326 (1933). There, a state's statutory remedy against shareholders of a bank had been repealed and replaced by a different procedure also against the shareholders. This Court found the substituted procedure to be effective and stated at 290 U.S. 332:

> ". . . although a vested cause of action is property and is protected from arbitrary interference [citation], the appellant has no property, in the constitutional sense, in any particular form of remedy; all

> that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure. . . ."

Petitioners here have been deprived of a substantial right to redress without the substitution of any effective remedy.

The same underlying concept of Due Process was adopted in *Forbes Pioneer Boat Line* v. *Board of Commissioners,* 258 U.S. 338, 339 (1922). An attempt by the Florida legislature to retroactively ratify an illegal tax was struck down in an opinion in which Justice Holmes stated:

> "Stripped of its conciliatory phrases the question is whether a state legislature can take away from a private party a right to recover money that is due when the act is passed. . . ."

The right invoked by Petitioners here is complete in that all necessary conditions for liability occurred prior to the repeal. To overcome, this, the Illinois Supreme Court echoed the ancient concept that "the king can do no wrong" when it cited a statement by Chief Justice Taney in 1858 that "'It is an established principle of jurisprudence in all civilized nations that the sovereign . . . may withdraw its consent [to be sued] whenever it may suppose that justice to the public requires it.' *Beers* v. *Arkansas,* 20 How. (U.S.) 527, 529." *Infra,* appendix, p. 9a. In *Beers* the Court did not face a retroactive repeal but rather a legislative requirement that bonds be deposited with the Court on suits against the state. The act did not extinguish a right but regulated a procedure. The question here is not a regulation of procedure but whether the sovereign may inject itself into pending liti-

gation to defeat rights of action without trial, jury deliberation, or a consideration of the merits.

Other states have refused to sanction retroactivity of legislation under similar circumstances. For example, in *Pickering* v. *Peskind,* 43 Ohio App. 401, 407, 183 N.E. 301, 303 (1930) the Court relying in part on the Due Process Clause refused to retroactively apply a statutory amendment raising the age of majority from 18 to 21, stating:

> "The plaintiffs cause of action, even though sounding in tort, must be recorded as a right of property. . . . which could not be taken away from her by the amendment. . .
>
> A right of action for tort is a right of property protected by the Constitution. Wade on Retroactive Laws §172."

A repeal of a state's waiver of immunity was found not to apply retrospectively in *Minty* v. *State,* 336 Mich. 370, 391, 58 N.W.2d 106, 112 (1953) which held an accrued statutory right of action for damages to person or property is vested. The same conclusion was reached in *Jones* v. *City of Los Angeles,* 215 Cal.App.2d 155, 30 Cal. Rptr. 124 (Dist.Ct.App. 1963).

The Petitioners here are proceeding on rights which have become consummate. They are not incohate rights predicated upon the continued existence of a statute. Every requirement set forth in the statute occurred while it was in existence. No effective remedy remains.[3]

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[3] Illinois has passed a Governmental Immunity Act granting immunity from liability for failure to provide police protection, failure to enforce the law or failure to apprehend criminals. Ill.Rev.Stat. 1967, Ch. 85, §2-202-205

The Illinois Supreme Court has suggested that persons harmed by mob violence might proceed against the persons who inflicted the injury, appendix, *infra*, p. 9a-10a. In the following sentence of its opinion the Court recognizes "[t]hat remedy may be of little practical value in many cases. . ." The suggestion disregards the very nature of mob violence with its open defiance of authority in tumultuous manner.

II.

In Retroactively Extinguishing the Right of Over Two Hundred Persons the State Action Has Disregarded the Fundamental Principles of Liberty and Justice Secured by the Fourteenth Amendment

The Mob Action Statute was first enacted in Illinois in 1887. Laws of Illinois, 1887, p. 237. The statute was upheld by this Court in *City of Chicago* v. *Sturges*, 222 U.S., 313, 324 (1911,) as tending "strongly to the upholding of the empire of the law." The statute serves a fundamental purpose of government set forth in our United States Constitution, *viz.*, to "insure domestic Tranquility." If society with order and justice is to survive, the sanctions for the inherent responsibilities of government should not be lowered.

To most persons the mob violence in our society is a disquieting but impersonal experience. To the over two hundred injured or damaged persons who sought the shelter of the Mob Action Statutes, it is a deeply personal experience. The effect of the repealers is not to change in the future but to expunge statutes as if they never existed.

The Court has stated in *Herbert* v. *Louisiana*, 272 U.S., 312, 316 (1926) that Due Process requires ". . . that state action . . . shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." These principles of liberty and justice revolt at state action which retroactively releases its units from the obligation enacted to secure its duties. The persons who have sustained injury or seen their property destroyed have been twice damaged, first by a failure of the essential governmental function of insuring domestic tranquility and, second, by a shedding of the burden securing the responsibility. Yet all persons are injured when we permit supposed exigencies of economics to smother individual rights. The empire of the law cannot be upheld without integrity of government, and should the fragmentation of that empire be given sanction, the purpose of our Constitution will become sterile.

CONCLUSION

Wherefore, Petitioners pray that the Petition for a Writ of Certiorari be granted and the judgment below reversed.

Respectfully submitted.

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APPENDIX A

STATUTORY PROVISIONS

Ill. Rev. Stat. 1965, Ch. 38 § 25-3

(a) Any person suffering material damage to property, injury to person or death as a result of any of the following unlawful activities shall have an action against the county in which such damage or injury is inflicted:

(1) Mob Action by 6 or more persons;

(2) Lynching; or

(3) Unlawful taking from the custody of any person legally exercising such custody.

In the event of death of the person injured the action authorized by this Subsection shall survive to a spouse or if there is no surviving spouse then to any person dependent for support upon the victim; Provided that recovery under this Subsection shall be limited to an amount not exceeding $30,000.

(b) A person may recover under Subsection 25-3(a) providing:

(1) He was not a participant in the mob action that produced the harm; and

(2) Notice of claim for damages is presented to the defendant county within 6 months after such wrong occurs; and

(3) Suit is filed within 12 months after such wrong occurs.

(c) An action under Subsection 25-3(a) shall not bar any injured party from maintaining an action or actions against any person or persons, participating in such mob action for recovery of damages sustained thereby. Any county which under Subsection 25-3(a) has paid any monies shall have a lien to the amount of such sum on any monies recovered by the Subsection 25-3(a) plaintiff

against any persons participating in such mob action. Any county recovered against under Subsection 25-3(a) or voluntarily settling any claim arising under Subsection 25-3(a) shall have an action to recover any such sums with all costs paid by it from any persons participating in such mob action.

Ill. Rev. Stat. 1965, Ch. 24 § 1-4-8

(a) Any person suffering material damage to property, injury to person or death as a result of any of the following unlawful activities shall have an action against the city, village or incorporated town in which such damage or injury is inflicted, but only if the city, village or incorporated town has a population in excess of 5,000:

(1) Mob action, as defined in Section 25-1 of the "Criminal Code of 1961", by 20 or more persons;

(2) Lynching; or

(3) Unlawful taking from the custody of any person legally exercising such custody.

In the event of death of the person injured the action authorized by this subsection (a) shall survive to a spouse or if there is no surviving spouse then to any person dependent for support upon the victim. Recovery under this subsection (a) shall be limited to an amount not exceeding $30,000.

(b) A person may recover under subsection (a) providing:

(1) He was not a participant in the mob action that produced the harm; and

(2) Notice of suit and filing of suit comply with the requirements in Sections 1-4-1 and 1-4-2.

(c) An action under subsection (a) shall not bar any injured party from maintaining an action or actions against any person or persons, participating in such mob action. Any city, incorporated town or village recovered against under subsection (a) or voluntarily settling any

claim arising under subsection (a) shall have an action to recover any such sums with all costs paid by it from any persons participating in such mob action.

Laws of Illinois, 1967, Vol. 2, p. 2365

Section 1. Section 25-3 of "An Act relating to criminal law and to repeal Acts and parts of Acts therein named," approved July 20, 1969, is hereby repealed.

Laws of Illinois, 1967, Vol. 2, p. 3286

Section 1. Section 1-4-8 of the "Illinois Municipal Code", approved May 29, 1961 as amended, is repealed.

Ill. Rev. Stat. 1965, Ch. 38 § 25-1

(a) Mob actions consists of any of the following:

(1) The use of force or violence disturbing the public peace by 2 or more persons acting together and without authority of law; or

(2) The assembly of 2 or more persons to do an unlawful act; or

(3) The assembly of 2 or more persons, without authority of law, for the purpose of doing violence to the person or property of any one supposed to have been guilty of a violation of the law, or for the purpose of exercising correctional powers or regulative powers over any persons by violence.

APPENDIX B

Docket No. 41336—Agenda 29—March, 1969.

L. C. SHELTON *et al.*, Appellees, *vs.* THE CITY OF CHICAGO *et al.*, Appellants.

Mr. JUSTICE SCHAEFER delivered the opinion of the court:

The two personal injury actions involved in this case were consolidated in the circuit court of Cook County. The defendants in each action are the City of Chicago and the County of Cook, and each action was brought to recover damages for personal injuries alleged to have been suffered as a result of mob action which took place in July of 1966. The plaintiff Shelton alleged that he was injured when he was shot by Chicago policemen who were endeavoring to suppress mob action, and the plaintiff Detres alleged that he was a passenger in an automobile which was set upon by a mob and suffered injuries when he was struck by flying glass. In each case the City and the County filed motions to dismiss the complaint which alleged, among other grounds, that the statutes upon which the actions were based had been repealed.

Affidavits filed by attorneys for the defendants showed that more than 200 actions were pending against the City and the County based upon the statutes involved in this case. In his order denying the motions to dismiss, the trial judge found, under Rule 308 of this court (Ill. Rev. Stat. 1967, ch. 110A, par. 308) that questions of law were involved with respect to which "there is substantial ground for difference of opinion" and that an immediate appeal from the interlocutory order denying the motions to dismiss might materially advance the ultimate determination of the litigation. Thereafter the appellate court granted the defendants' application for leave to appeal under that Rule. Subsequently, this court granted the motion of the

City and the County to transfer the appeal from the appellate court to this court pursuant to Rule 302(d). Ill. Rev. Stat. 1967, ch. 110A, par. 302.

The following questions were certified by the trial court:

"(1) Whether the County, pursuant to Section 25-3 of the Criminal Code of 1961, as amended (Ill. Rev. Stat. 1965, ch. 38, § 25-3), is liable for mob violence occurring in cities within the county of over 5,000 persons, and, if so, whether said statute is constitutional;

"(2) Whether Section 1-4-8 of the Illinois Municipal Code (Ill. Rev. Stat. 1965, ch. 24, § 1-4-8) is constitutional because it applies only to cities of over 5,000 in population and, therefore, according to the City, constitutes special legislation as to that class;

"(3) Whether the 'Local Governmental and Governmental Employees Tort Immunity Act,' Chapter 85, § 2-103, 2-109, 2-2-2 and 4-102 (Ill. Rev. Stat. c. 85, § 2-103, 2-109, 2-2-2 and 4-102 (1965) passed on August 13, *1965*, and thus before this cause of action arose, repealed by *implication* the two statutes on which the complaints are based;

"(4) Whether acts passed by the *1967* Legislature, Act 815 and Act 1283, repeal both Section 25-3 of the Criminal Code of 1961 as amended (Ill. Rev. Stat. 1965, ch. 38, section 25-3) (applicable to the County) and Section 1-4-8 of the Illinois Municipal Code (Ill. Rev. Stat. 1965, ch. 24, § 1-4-8) (applicable to the City) and *retroactively* defeat this cause of action, which arose and was filed in this Court prior to the enactment of this *1967* legislation."

An affirmative answer to the last of the certified questions would eliminate all of the others, and we therefore consider that question at once. In 1967 the General Assembly enacted statutes which expressly repealed section 1-4-8 of the Illinois Municipal Code (House Bill 598), and section 25-3 of the Criminal Code (House Bill 1856), which are the two statutes upon which liability in these

cases is predicated. Both of the repealing acts were approved by the Governor. (Laws of 1967, Vol. 2, pp. 3286, 2365.) At the same session, however, the General Assembly also amended section 1-4-8 of the Illinois Municipal Code (House Bill 958). This bill was also approved by the Governor (Laws of 1967, p. 3724), and it is contended that this bill, which was approved by the Governor on September 7, 1967, operated to re-enact the repealed section of the Municipal Code, despite the express repeal contained in House Bill 598, which was approved on August 21, 1967.

We find it unnecessary, in the circumstances of this case, to consider what, if any, significance should be accorded to the fact that the amendatory act was approved by the Governor more than two weeks after he had approved the repealing act. The amendatory act was one of a package of 174 bills which were prepared by the Legislative Reference Bureau to bring various statutes into conformity with the new Judicial Article of the Constitution, to delete obsolete terms, or to combine or rearrange sections, without making substantive changes. The single description applicable to all 174 bills which was contained in the Legislative Synopsis and Digest was as follows:

> "HB-915 TO 1089 INCL. MC DEVITT AND PARKHURST
>
> Amends, combines, resections or deletes terms in the following Acts or sections, making no substantive change:" (Here followed a listing of the individual bills by number, together with a reference to the section or sections affected by each bill.)

It cannot, we think, be fairly contended that the General Assembly intended, by a bill which purported to make no change of substance, to re-enact the repealed provisions of section 1-4-8.

If further indication of the legislature's intention to repeal section 1-4-8 of the Municipal Code was required, it is found in House Bill 2810, which was approved August 17, 1968. This bill, which was passed after the circuit

court had denied the motions to dismiss the complaints in the present cases, again expressly repealed section 1-4-8. It was passed by a two-thirds vote in each house, and it contained the following emergency clause: "Section 2. Whereas some courts have, contrary to the real intention of this General Assembly, construed House Bill 958 as a reenactment and reinstatement of Section 1-4-8 of the 'Illinois Municipal Code' despite the repeal of that Section by House Bill 598, therefore an emergency exists and this Act shall take effect upon its becoming a law." Ill. Rev. Stat., 1968 Supp., p. 98.

We conclude that the legislative purpose to repeal the statutes upon which these actions are based is unmistakable. Even so, the plaintiffs argue, the repeals were not intended and should not be construed to apply retroactively to bar their actions. To establish this contention they rely upon section 4 of the Statutory Construction Act, which provides: "No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding." Ill. Rev. Stat. 1967, ch. 131, par. 4.

If this statutory expression of legislative intention was before the court for the first time, the plaintiffs' contention would not lack persuasiveness, for the statute refers to the effect of express repeals upon claims that have arisen. But we are not at liberty to disregard the earlier decisions of this court construing the Statutory Construction Act, for those decisions must have entered into the General Assembly's understanding of the meaning of that Act.

At least since the decision of this court in *People ex rel. Eitel* v. *Lindheimer* (1939), 371 Ill. 367, it has been consistently held that the Statutory Construction Act does not apply to express repeals of special statutory remedies. In *Board of Education* v. *Nickell,* 410 Ill. 98, 103, we said: "The effect of the Statutory Construction Act was thoroughly considered in *People ex rel. Eitel* v. *Lindheimer,* 371 Ill. 367, where this court said: 'The unconditional repeal of a special remedial statute without a saving clause stops all pending actions where the repeal finds them. If final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal.'" And again in *Hogan* v. *Bleeker,* 29 Ill.2d 181, 185: "We have held that the legislature has the power to withdraw jurisdiction of the courts over statutory causes of action and the exercise of that power leaves all such causes of action and pending suits where the repeal finds them. (*People ex rel. Eitel* v. *Lindheimer,* 371 Ill. 367; *Orlicki* v. *McCarthy,* 4 Ill.2d 342.) This is true despite the Statutory Construction Act (Ill. Rev. Stat. 1961, ch. 131, par. 4) which has been held not applicable to repeals. *People* v. *Lindheimer,* 371 Ill. 367; 45 Ill. L. Rev. 111."

We are unable to accept the plaintiffs' contention that because their injuries had occurred and their pending actions had been commenced while the repealed statutes were in effect, their rights were vested, and could not, as a matter of constitutional law, be retroactively defeated by the repeals. The remedy sought to be asserted is clearly, in the language of our earlier decisions, a special statutory remedy. There is in these cases no element of contract, nor is there any suggestion of conduct by the plaintiffs undertaken in reliance upon the repealed statutes. (See Smith, Retroactive Laws and Vested Rights, 6 Texas L.R. 409, 429.) No "vested right" is involved. The legislature, which for a time had permitted a remedy against subordinate governmental units for damage resulting from mob violence, has withdrawn that remedy.

What was said in 1858 by Chief Justice Taney in an analogous situation, is pertinent here: "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogther voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it." *Beers v. Arkansas*, 20 How. (U.S.) 527, 529, 15 L. Ed. 991, 992.

Finally, the plaintiffs argue that the defendants should be held liable at common law, apart from any statute. Their argument recognizes that "there are no cases at common law dealing with municipal liability for riot damage", but they suggest that the erosion of the doctrine of governmental immunity, and the simultaneous expansion of concepts of strict liability, warrant the recognition of a common law cause of action. They emphasize the injustice of permitting the losses that result from riot damage to person or property to be borne by those innocent victims upon whom they chance to fall. Those losses, they suggest, should be broadly distributed. And they urge that the imposition of fiscal responsibility upon municipal governments would stimulate community concern for the maintenance of law and order and the alleviation of undesirable social conditions, and thus tend to reduce the likelihood of future riots.

Insofar as this argument emphasizes the desirability of alleviating the loss suffered by one who is without fault, it carries a strong appeal. But there are other considerations that must be taken into account. One who has suffered riot damage has a remedy against the persons who inflicted the injury. That remedy may be of little practical value in many cases, but the same is true of the

victim of a rape, a robbery, or a hit-and-run driver. It is hard to say that one group of innocent victims of criminal conduct is more deserving of compensation from the community than the other. Despite peripheral moderations, fault remains the cornerstone of the common law of torts. The particular units of local government upon which liability is sought to be imposed are not directly responsible for the injuries suffered by the plaintiffs in these cases. A legislature is better equipped than is a court to appraise the issues of policy involved in selecting the unit of government upon which to impose an insurer's liability of the type here involved. (See, Sengstock, Mob Action: Who Shall Pay the Price? 44 Journal of Urban Law, 407 (1967); 81 Harv. L. Rev. 653 (1968); 77 Yale L.J. 541 (1968).) And in any case, it would be anomalous for this court to assert a common law right to recover immediately after the legislature has repealed the former statutory remedies.

The order of the circuit court of Cook County overruling the motions to dismiss is reversed, and the cause is remanded to that court with directions to dismiss the complaints.

Reversed and remanded, with directions.

Mr. JUSTICE WARD took no part in the consideration or decision of this case.

TRIAL COURT OPINION

State of Illinois)
) SS
County of Cook)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Law Division

L. C. Shelton,
Plaintiff,
vs.
City of Chicago, a Municipal Corporation, and County of Cook, A Body Politic, and Unknown Policeman of City of Chicago,
Defendants.
No. 66 L 17156

OPINION

This action was brought by L. C. Shelton against the City of Chicago, Cook County and an unknown policeman of the City of Chicago for personal injuries suffered during riots in the City of Chicago which occurred in July, 1966. The complaint sets forth three counts: Count I, which names the City of Chicago and an unknown city policeman as defendants, charges the City of Chicago with negligence in that one of its agents, an unknown police officer, while engaged in attempting to quell a civil disturbance, negligently and without warning discharged his firearm thereby wounding the plaintiff and causing him serious bodily injury. Count II, which names only the City of Chicago as a defendant, pleads the Illinois Revised Statutes, Chapter 24, Section 1-4-8 (1965), which reads in part:

"§1-4-8. Damage caused by mob violence, etc.

"(a) Any person suffering material damage to property, injury to person or death as a result of

any of the following unlawful activities shall have an action against the city, village or incorporated town in which such damage or injury is inflicted, but only if the city, village or incorporated town has a population in excess of 5,000;

"(1) Mob action, as defined in Section 25-1 of the 'Criminal Code of 1961,' by 20 or more persons;

* * *

"(b) A person may recover under subsection (a) providing:

"(1) He was not a participant in the mob action that produced the harm; and

"(2) Notice of suit and filing of suit comply with the requirements in Sections 1-4-1 and 1-4-2."

and alleges that plaintiff was injured when Chicago police officers, who were engaged in attempting to quell, control and suppress mob action of 20 or more persons, in the immediate vicinity of 1511 South Kedzie Avenue, Chicago, discharged their firearms thereby injuring plaintiff who was not a participant in said mob action. And Count III, which names only the County of Cook as a defendant, pleads the Illinois Revised Statutes, Chapter 38, Sections 25-1 and 25-3, which read in part:

"§25-1. Mob Action. (a) Mob action consists of any of the following;

"(1) The use of force or violence disturbing the public peace by 2 or more persons acting together and without authority of law; or

"(2) The assembly of 2 or more persons to do an unlawful act;

* * *

"§25-3. Recovery of Damages. (a) Any person suffering material damage to property, injury to person or death as a result of any of the following unlawful activities shall have an action against the county in which such damage or injury is inflicted;

"(1) Mob action by 6 or more persons;

* * *

"(b) A person may recover under Subsection 25-3(a) providing:

"(1) He was not a participant in the mob action that produced the harm; and

"(2) Notice of claim for damages is presented to the defendant county within 6 months after such wrong occurs; and

"(3) Suit is filed within 12 months after such wrong occurs."

and alleges the same facts as in Count II.

A companion case, *Americo Detres, Sr., as father, etc. of America Detres, Jr., a minor, plaintiff, vs. City of Chicago and The County of Cook,* defendants, No. 66 L 17827, in Count I and II of the Amended Complaint charges essentially that a mob in excess of twenty persons acting in a violent fashion in the City of Chicago on July 15, 1966, attacked the automobile in which plaintiff minor was riding as a passenger and threw "flying glass" at him, causing personal injuries. Count I is against the City of Chicago claiming a cause of action under Illinois Revised Statutes (1965), Chapter 24, §1-4-8. Count II is against the County of Cook, claiming a cause of action under Illinois Revised Statutes (1965), Chapter 38, §25-3. The two defendants have filed motions to strike raising the same legal defenses as claimed by them in the *Shelton* case, No. 66-L-17156.

The question of the amount of damages claimed in the ad damnum clause as viewed in the light of the $30,000 limitation in the two statutes relied on by plaintiffs was not argued, was not considered by this Court and is not covered in any way by the present ruling. Count I of the Shelton complaint is not involved in defendant's motions to dismiss.

The legal questions raised by such motions to dismiss present the following issues for determination and resolution.

(1) Whether the County, pursuant to Chapter 38, §25-3, (ILL. REV. STAT., C. 38, §25-3 (1965)) is liable for mob violence occurring in cities within the County of over 5,000 persons, and if so whether said statute is constitutional;

(2) Whether Chapter 24, §1-4-8 (ILL. REV. STAT. C. 24, §1-4-8 (1965)) is constitutional because it applies only to cities of over 5,000 in population and therefore, according to the City, constitutes special legislation as to that class;

(3) Whether the "Local Governmental and Governmental Employees Tort Immunity Act", Chapter 85, §§2-103, 2-109, 2-2-2 and 4-102 (ILL. REV. STAT. C. 85, §§2-103, 2-109, 2-2-2 and 4-102 (1965)) passed on August 13, *1965*, and thus before this cause of action arose, repealed by *implication* the two statutes on which Counts II and III are based;

(4) Whether acts passed by the *1967* Legislature, Act 815 and Act 1283, repeal both Chapter 38, §25-3 (applicable to the County) and Chapter 24, §1-4-8 (applicable to the City) and *retroactively* defeat this cause of action, which arose and was filed in this Court prior to the enactment of this *1967* legislation.

I.

Historical Background of the Mob Riot Statutes

In resolving these legal issues it is necessary to give some consideration to the general historical background of municipal (including county) liability for mob violence, and the somewhat complex Illinois legislative history of the two specific statutes in question which were in effect at the time of the mob action in July, 1966.

Legislation of this type has ancient precedent in England, and in this country it found its way into the statute books of some of the older states when the nation was still in its infancy. Indeed, as early as 1285, during the reign of Edward I of England, Parliament passed the

statute of Winchester which held the hundred, as the kingdom was then divided, liable for the loss suffered by a robbery victim, if the hundred failed to produce the felon (13 Edw. I, Stat. 2 (1 Stats. Large 230) (1285)). Other similar statutes include 28 Edw. III, C. 11 (2 Stats. Large 101) (1354); 27 Eliz., C. 13 (6 Stats. Large 313) (1585); 29 Car. III, C. 7 (8 Stats. Large 412 (1676); 8 Geo. II, C. 16 (16 Stats. Large 511) (1735); 22 Geo. II, C. 24 (19 Stats. Large 305) (1749). Of the same nature was the action given by 9 Geo. I, C. 22 (15 Stats. Large 88) (1722), the so-called "black act", against the inhabitants of any hundred for satisfaction in damages to all persons who had suffered by the offenses enumerated and made a felony by the act. These acts, which created municipal liability for particular crimes or injuries to the person were eventually repealed and omitted from the consolidating Act, 7 & 8 Geo. IV, cc. 27-31 (67 Stats. Large 168) (1827). However, municipal liability for damage to "property" by riot which appeared in England first in 1714 (1 Geo. I, Stat. 2 C. 5 [13 Stats. Large 142]; see also 7 & 8 Geo. IV, C. 31 [67 Stats. Large 202] [1827]), is found in modified form in "The Riot (Damages) Act," 49 & 50 Vict., C. 38 (1886 Gen. Stats. 89). See the history as outlined in *Slaton* v. *City of Chicago,* 8 Ill. App. 2d 47 (1955), and the early case of *Spring Valley Coal Co.* v. *City of Spring Valley,* 65 Ill. App. 571 (1896). See also the historical discussion in *City of Chicago* v. *Manhattan Cement Co.,* 178 Ill. 372, 377, 386 (1899); Sengstock: *Mob Actions Who Shall Pay the Price,* 44 Journal of Urban Law, 407, at 423 (1967).

The need in Illinois for imposing liability on municipalities for mob violence arose after the Civil War as growing tension between capital and labor erupted in violence causing destruction of private property. In 1887 the General Assembly passed "An Act to indemnify the owners of property for damages occasioned by mobs and riots" Ill. Rev Stats. S. 38 §§518-524 (1951). Recovery under the Act was limited to property damage—"any building or other real or personal property, except prop-

erty in transit"—inflicted by a mob or riot composed of twelve or more persons. Recovery was against the city, or if not in a city, then the county in which such property was destroyed.

During the same period lynching became a problem of serious proportions throughout the country. In 1897 House Bill No. 395 entitled "An Act for the suppression of mob violence and lynching" was introduced, but this bill failed during the readings. In 1899 House Bill No. 462, "An Act for the suppression of mob violence," was introduced and was amended to read, "An Act for the suppression of mob violence, riot or lynching and to indemnify persons injured thereby." This bill was voted down in its final form. After subsequent attempts and failures in Illinois in 1901 and 1903 to pass identical or similar bills, the General Assembly in 1905 finally enacted "An Act to suppress mob violence," Ill. Rev. Stats. C. 38 §§512-517 (1951). Damages to property or to the person were recoverable against the city or county when caused by a mob of "five or more in number."

Both the Act of 1887 and the Act of 1905 covered essentially the same subject matter although the former was limited to property damages for which three-fourths of the damages sustained were recoverable. The 1905 Act applied to both property damage and personal injury but recovery was limited to $5,000.

In 1931 the 1905 Act was amended (Laws 1931, p. 454, §1) to include the park district, so that the "county, park district or city in which such injury is inflicted" were liable for mob action. This amendment also increased the recoverable damages to $10,000. In 1955 the 1887 Act was amended to give a right of action against not only the city and county, but also against a village or town. Liability of the county continued to arise only if the mob action occurred in unincorporated areas. (Laws 1955, p. 1414, §1).

In 1961 the entire substantive criminal code (Chapter 38) was rewritten and the then existing statutes, Sections

515 (the 1905 Act) and 518 (the 1887 Act) were repealed. Their provisions were combined and incorporated in Chapter 38, Section 25-3. Under the 1961 provision the county was held liable for mob violence "or if inflicted in an unincorporated city, town or village whose population is in excess of 5,000 then against such city, town or village." Recovery was provided for property damage, personal injuries or death. A mob was defined as six or more persons. (Ill. Rev. Stats. C. 38, §25-3 (1961)).

On May 2, 1963, Chapter 38, Section 25-3, was amended and liability under the provision of the Criminal Code was limited to the *county* only. "Any person suffering material damage to property, injury to person or death as a result" of "mob violence by 6 or more persons," shall have "an action against the county in which such damage or injury is inflicted." Contrary to prior statutes the County's liability was not limited to areas outside of incorporated cities, towns or villages of over 5,000 persons. At the same time in 1963 the Legislature passed Chapter 24, Section 1-4-8, which specified the same liability against cities, villages or incorporated towns of over 5,000 for damages or injuries committed by a mob of 6 or more. Ill. Rev. Stats. C. 24 §1-4-8 (1963). In 1965 this latter statute was amended so that liability arose as to said cities, villages or incorporated areas of over 5,000 persons, if the mob consisted of "20 or more persons." Ill. Rev. Stats. C. 24, §1-4-8 (1965).

No question of repeal arises prior to 1965. However, the legislative changes in the substantive requirements or conditions precedent to the establishment of a civil cause of action reflect a gradual evolvement of a legislative plan to cover the "rights" of innocent victims of a mob regardless of the particular part of the country where the mob inflicted the injury or damage. In other words, wherever the mob caused injury or damage took place there was a legislative determination that some public body—county or municipality—had some kind of responsibility. Cf. *City of Chicago* v. *Manhattan Cement Co.*, 178 Ill. 372 at 386-387.

Question of Implied Repeal in 1965.

In 1965 the Illinois General Assembly enacted the act entitled "...In relation to the tort immunity of local public entities and their employees and to repeal acts etc". This statute is commonly designated as the "Local Governmental and Governmental Employees Tort Immunity Act." Ill. Rev. Stats. (1965), Chap. 85, Sections 1 through 10, pp. 709-716. It is this latter statute that defendants contend repeals by implication both Chap. 38, Section 25-3 (Ill. Rev. Stats. 1965, Chap. 38, Section 25-3) and Chap. 24, Sec. 1-4-8 (Ill. Rev. Stats., 1965, Chap. 24, Sec. 1-4-8).

Question of Express Repeal in 1967.

In the 1967 session of the Illinois Legislature four bills relating to civil actions for mob violence were passed by both houses and sent to the governor for his action.

The governor approved three of these bills and vetoed one.

These four bills, listed in chronological order of the governor's action are as follows

House Bill 1856—signed July 31, 1967 and becoming Act 815. This Act repealed Chapter 38, Section 25-3, pertaining to the liability of the county for mob violence.

House Bill 1375—vetoed July 31, 1967. This bill, if enacted, would have increased the number of participants required for suits against the county under Chapter 38, Section 25-3, from six to twenty and would have exempted the county from liability where the mob action occurred in a city with a population in excess of 5,000 persons.

House Bill 598—signed August 21, 1967 and becoming Act 1283. This Act repealed Chapter 24, Section 1-4-8, pertaining to the liability of cities, etc., of over 5,000 persons for mob violence.

House Bill 958—signed September 7, 1967 and becoming Act 1914. This Act amends Chapter 24, Section 1-4-8 in that it changes the notice requirement to conform with the Local Governmental Immunity Act.

II.

With this historical sketch in mind, the difficult issues raised by the parties can now be resolved.

1. *Limited Liability of the County.*

The County contends that its liability in July, 1966 under Chapter 38, Section 25-3 (Ill. Rev. Stats. (1965)) is limited only to cities, villages or incorporated areas of 5,000 persons or less and unincorporated areas. It further argues that to the extent this statute purports to hold the County liable for damages and injuries suffered in cities, villages and incorporated areas of over 5,000 persons, it constitutes an unlawful exercise of police power, and is an arbitrary imposition of liability in violation of due process and equal protection of the law.

In support of its first contention, that as a matter of statutory construction, the liability of the County is limited to communities of 5,000 persons and less and unincorporated areas, the County carefully sets forth the legislative history which demonstrates that under several of the prior statutes its liability was so limited. For example, its liability under the Act of 1887 was expressly limited to areas outside of cities. See Ill. Rev. Stats., C. 38, §518 (1951). The Act of 1905, which permitted recovery "against the county or city" in which the injury was inflicted, was construed by the Seven Circuit Court of Appeals in *Conto* v. *Franklin County,* 275 Fed. 806 (7th Cir. 1921), as limiting the county's liability to areas outside of cities. If damages were inflicted within a city, then the city itself was liable. Again in 1961, when the Acts of 1887 and 1905 were combined in Chapter 38, Section 25-3, the County's liability was expressly limited to areas outside of incorporated cities, towns or villages of over 5,000 persons. Ill. Rev. Stats., C. 38 §25-3 (1961).

In spite of this legislative history *prior* to 1963 it is clear that the *1963* General Assembly, in amending Chapter 38, Section 25-3 in 1963, did place upon the county liability for mob violence occurring anywhere within the county. The amended statute provides that "Any person suffering material damage to property, injury to person or death as a result of [mob action by 6 or more persons] ... shall have an action against the county in which such damage or injury is inflicted." Ill. Rev. Stats., C. 38, §25-3 (1963). Under the words of this 1963 amendment the liability of the county was independent of any liability of a city and was co-extensive with the boundaries of the county.

Three reasons exist which lead this Court to the conclusion that the Legislature intended to make the county liable for mob violence occurring in *any part* of the county. First, the Legislature, in amending the Act in 1963, did not use any language which would limit the area of liability as to the county as it had expressly and specifically done in earlier statutes. The following language is contained in the Committee Comments to this statute:

> "The balance of the article is substantially a restatement and reorganization of the supplementary provisions mentioned above. No substantial change in the law is involved, but the provisions have been rephrased to accord with current conditions and political subdivisions. (Note: Under the original draft of Section 25-3 as adopted in 1961, the cause of action for damages lay against the incorporated city, village or town with a population in excess of 5,000 (in addition to the county). In 1963, the Section was amended to eliminate all references to a city, town or village. The cause of action for recovery of damages now exists only against the county.)" Committee Comments, par. 3; SHA Stats., 1965, C. 38, §25-1.

Plus comments, of course, with reference to the Criminal Code.

Second, to adopt the County's argument and limit its area of liability would create a gap in the law, as it now exists. The Court does not believe that the Legislature by its action intended to create such a gap. In 1963 when the liability of cities, villages and incorporated towns for riots was separated out of the Criminal Code (Chapter 38, §25-3) and placed in the Municipal Code (Chapter 24, §1-4-8), liability of the County and the City were essentially the same in that the mob had to consist of 6 or more persons. However, in 1965, when the Legislature amended Chapter 24, Section 1-4-8, it increased the size of the mob, before liability would attach to the City, to 20 or more. (Ill. Rev. Stat. C. 24, §1-4-8 (1965)). If the Court were to accept the County's argument it would mean an injured person could recover against the County only if the mob violence of 6 or more persons occurred in unincorporated areas or a city of 5,000 persons or less, and he could recover against a city of over 5,000 persons only if the riot consisted of 20 or more persons. Thus, under the County's argument there could be no recovery if the plaintiff was injured in a city, town or village of over 5,000 persons if the mob consisted of 19 or less persons. Such a construction of the statutes in question would raise a serious constitutional problem. As a matter of construction such a constitutional problem warrants rejection of the County's contention.

Third, the General Assembly in 1967, when it was considering amending this statute, enacted House Bill 1375, which expressly by language sought to exempt the County from liability where the mob action occurred in a city with a population in excess of 5,000 persons. [This bill was vetoed by the governor only because a second act was signed which purportedly repealed the entire statute.] This 1967 bill expresses thinking by the Assembly that if liability were to be limited as the County now suggests, it was necessary to amend the Act itself and expressly incorporate the limitation.

Accordingly, from the material available on the question of general legislative intent and considering the

meaning of the literal language employed, this Court is compelled to conclude that under the statute in effect in 1966 the County is liable for damages sustained by any person injured by a mob of 6 or more persons located anywhere in the County, as provided for and as limited by Chapter 38, Section 25-3. (Ill. Rev. Stats. 1965).

2. *Unconstitutionality As to County.*

The County claims that the foregoing construction of the statute violates the due process clauses of both the Federal and Illinois constitutions.

The County contends that if Chapter 38, Section 25-3 is or would be construed to impose liability upon the County for injuries or damages resulting from mob violence occurring *within* cities, villages(or incorporated areas or public entities of over 5,000 population, it is unconstitutional. The alleged unconstitutionality resolves itself into the claim that the County has little authoritative control over the area within the city limits where the population is in excess of 5,000 and therefore the police power of the State imposing a liability on. the County for mob violence is illegal or unlawful or does not exist.

In the early case of *City of Chicago* v. *Manhattan Cement Co.,* 178 Ill. 372 (1899), the Supreme Court established the essential nature of "mob riot statutes." The statute imposes a liability upon the local entity upon certain enumerated conditions; it is not a donation; it does not establish a debt; it is an exercise by the State of its police power notwithstanding an absence of fault or neglect of duty. The opinion quotes from Cooley on Taxation saying of such legislation: "Such legislation is, in effect, only a part of the State police system, under which the municipal divisions are severally looked to for the preservation of the public peace within their respective limits." (178 Ill. at 384).

In *Sturges* v. *City of Chicago,* 237 Ill. 46 (1908) the court quoted from the early case of *Darlington* v. *State of*

New York, 31 N.Y. 163, talking about "public expense" and the interest of "every person liable to contribute to the public expense to discourage lawlessness . . . to preserve public quiet and social order" (237 Ill. at 54). And the Illinois court upholds the Act as a valid exercise of the police power of the State and rejected the contention that the statute violated due process or denied equal protection of the law.

(Under a subsequent section of this opinion further attention will be given as to the "modern" conception of mob riot legislation.)

The County's primary contention is that imposing liability upon the County for mob violence in such areas, over which it has little authoritative control as compared to the City itself, constitutes an unlawful exercise of police power.

The Supreme Court of the United States, in passing on the validity of the Act of 1887 under the Federal Constitution stated in *City of Chicago* v. *Sturges,* 222 U.S. 313, 323-24 (1911):

> "The imposition of absolute liability upon the community when property is destroyed through the violence of a mob is not an unusual police regulation. Neither is it arbitrary, as not resting upon reasonable grounds of policy. Such a regulation has a tendency to deter the lawless, since the sufferer must be compensated by a tax burden which will fall upon all property, including that of the evil doers as members of the community. It is likewise calculated to stimulate the exertions of the indifferent and the law-abiding to avoid the falling of a burden which they must share with the lawless. In that it directly operates on and affects public opinion, it tends strongly to the upholding of the empire of the law."

It is the conclusion of this Court that those individuals living in Niles, Cook County, should be vitally concerned with a potentially dangerous situation in Chicago Heights

or in Maywood or on the west side of Chicago, for they are not so far removed from those areas as not to one day feel the full economic, social and racial impact of the struggle now taking place. They can and should voice their feelings by electing County officials who will take that course of action they feel is needed to correct the problem. Imposing upon them the obligation of alleviating some of the financial burden incurred by innocent victims of such riots will create the very response intended by the Act. It, therefore, cannot be said that this statute constitutes an unauthorized exercise of police power.

The County also argues that because of the disparity between the City of Chicago and the County relative to the controlling of riots within the City (the County having only 161 to 167 sworn police officers as compared to the City's 10,720 to 10,853 sworn officers) an attempt of the Legislature to impose the same liability upon the County as on the City for damages caused by City riots, is arbitrary and in violation of due process and equal protection of the law. However, both the United States Supreme Court in the *Sturges* case and the Seventh Circuit Court of Appeals in the *Conto* case recognized the power of the Illinois Legislature to create just this type of liability. In *Conto* (275 Fed. 806, 807 (1905)) the Court was faced with the question of whether the county, under the 1905 Act, was liable for damages sustained in cities. The Court specifically recognized the power of the Legislature to impose such liability: ". . . it was undoubtedly within the legislative power to prescribe upon which [the city or county] the liability shall rest;" however, the Court construed the legislative intent as limiting the County's area of liability, an intent which does not exist under the present statute.

In the *Sturges* decision (222 U.S. 313, 324 (1911)), the Supreme Court stated, concerning the 1887 Act:

> "The power of the State to impose liability for damages and injury to property from riots and mobs includes the power to make a classification of the

subordinate municipalities upon which the responsibility may be imposed. It is a matter for the exercise of legislative discretion, and the equal protection of the law is not denied where the classification is not so unreasonable and extravagant as to be a mere arbitrary mandate."

Holding the County liable for damages suffered anywhere in the County because of mob violence is not so unreasonable or extravagant as to be a mere arbitrary mandate. On the contrary, to adopt the County's construction of the statute, thereby leaving a certain segment of the population outside of the statutory coverage (persons living in cities of over 5,000 persons injured by a mob of less than 20 persons), would raise the very constitutional problems now being argued.

3. *The City's Claim That The Statute Violates Section 22 of Article IV of the Illinois Constitution.*

The City contends that Chapter 24, Section 1-4-8 is unconstitutional because it applies only to cities of over 5,000 persons and thus constitutes special legislation as to that class in violation of Section 22 of Article IV of the Illinois Constitution. This argument is without merit. The City itself answers it in its brief when it states that "the test is whether victims of tortious conduct throughout the State are treated equally." The City is not this victim for which the statute grants relief, and thus has no standing to raise the constitutional issue. It is in no way injuriously affected by the limitations provided by the operation of the purportedly unconstitutional provisions of this statute, even conceding, for the moment, that the classifications made between cities of varying populations are arbitrary and capricious. Only a person injured by a mob in a city of 5,000 or less would have standing to raise this constitutional question. *Liberty National Bank* v. *Collins,* 388 Ill. 549, 559 (1945); *Goldman* v. *Quinn,* 60 R.I. 335, 198 Atl. 549 (1938).

Furthermore, the City made the identical argument in *City of Chicago* v. *Sturges*, 222 U.S. 313 (1911) which was rejected by the United States Supreme Court. In that case the plaintiff recovered a judgment against the City under the Act of 1887, discussed above. Under that act, a city was made liable for three-quarters of the damage resulting to property situated therein, caused by a mob of twelve or more persons. If damage was to property not within the city, the plaintiff had to look to the county in which it was located. The City argued that the Act of 1887 discriminated arbitrarily between cities on the one hand and villages or other incorporated towns on the other and was thus unconstitutional. The Court totally rejected this argument stating that the power to impose such liability includes the power to classify the municipalities upon which the responsibility may be imposed. The Court concluded that limiting liability to cities only was not an arbitrary classification. So, too, limiting liability under Chapter 24, Section 1-4-8 to cities, villages and incorporated towns of over 5,000 persons is not an arbitrary classification in violation of the Illinois Constitution.

4. *Repeal By Implication.*

Both the City and County argue that the Chapter 38, Section 25-3 and Chapter 24, Section 1-4-8 were repealed by *implication* in *1965* with the enactment of the "Local Governmental and Governmental Employees Tort Immunity Act." ILL. REV. STATS., C. 85 (1965).

Apart from the fact that repeals by implication are not favored in the law, it is clear that the statutes in question are decidedly dissimilar in a number of respects from the 1965 legislation. Whereas the Governmental Tort Immunity Statute is concerned with torts committed by governmental employees and the liability of the government arising therefrom, both Chapted 38, Section 25-3 and Chapter 24, Section 1-4-8, deal with liability of the City and County for damages inflicted by mobs during

a civil disorder. The underlying purpose of the latter statute is to motivate the populace to action in curbing civil disobedience, whereas the Governmental Tort Immunity Statute is concerned with tortious conduct of government employees which creates no underlying need for mobilizing public concern. Both Chapter 38, Section 25-3, and Chapter 24, Section 1-4-8 deal with strict liability of the County and City. The Governmental Tort Immunity Statute is concerned with liability arising from tortious conduct. These differences in purpose, liability and operation are substantial and militate against any repeal by implication. See Baum, *Tort Liability of Local Governments and Their Employees: An Introduction to the Illinois Immunity Act,* 1966 ILL. LAW FORUM, 981, 990-91, wherein it is stated:

> "The mob action statutes, at least, are sufficiently important and well known that they too would have been repealed if that were the intention of the legislature and the draftsmen who prepared the Immunity Act. These are good reasons, therefore, for assuming that both statutes remain in full effect."

To the same effect by another writer — Siegel, *Civil Disobedience and Riot Damage—Current Liability and the New Immunity Statute*, 48 CHI. B. REC. 17, at 20-21 (1966).

Subsequent action by the Illinois General Assembly further substantiates the position taken by this Court. In *1965,* at the same session the Governmental Tort Immunity Statute was enacted, the Legislature amended Chapter 24, Section 1-4-8, which in effect changed the substantive rights of persons injured during riots. Instead of allowing recovery against a city, village or incorporated town of over 5,000 persons for damages inflicted by a mob of six or more persons, the amendment allowed recovery only if the damages were inflicted by 20 or more persons. Such an amendment would have been entirely inconsistent with any repeal by implication as the parties now suggest.

Furthermore, the Legislature in *1967* specifically attempted to repeal both statutes by the enactment of House Bill 1856 (which purportedly repealed Chapter 38, Section 25-3) approved on July 31, 1967 and House Bill 598 (which purportedly repealed Chapter 24, Section 1-4-8) on August 21, 1967. Additionally the passage of House Bill 1375, on July 31, 1967 and enactment of House Bill 958 approved on September 7, 1967, also dealing directly with these statutes, are the strongest evidence possible of the continuing vitality of these statutes down to the date this law suit was filed.

5. *Repeal Affecting Claims Arising Prior to Repeal.*

Finally, both the City and County argue that Chapter 38, Section 25-3 and Chapter 24, Section 1-4-8 created a special liability not found in the common law and therefore because this legislation was expressly repealed in 1967 pending litigation based upon these Acts must be dismissed. In substance the defendants argue that the repeal of the two statutes in question operates *retroactively* as to pending law suits because there is no express savings clause with regard to the "mob riot" statutes in question.

It should be first noted that retroactive laws are looked upon with general disfavor. The Illinois Supreme Court in *U.S. Steel Credit Union* v. *Knight*, 32 Ill. 2d 138, 142 (1965), stated:

> "Retroactive legislation is not favored, and as a general rule statutes are construed to operate prospectively unless the legislative intent that they be given retroactive operation clearly appears from the express language of the acts, or by necessary or unavoidable implication. (*Bauer Grocer Co.* v. *Zelle*, 172 Ill. 407; *Anderson* v. *Board of Education*, 390 Ill. 412). Conversely, if the language of a statute requires retroactive application, it is the duty of the Courts to so apply it. (*People ex rel. Kroner* v. *Abbott*, 274 Ill. 380)."

As noted by the Supreme Court in *Orlicki* v. *McCarthy,* 4 Ill. 2d 342, 346 (1954), the doctrine that legislation must be prospective in character is traceable to Coke and Brackton and was incorporated into American jurisprudence by Kent and Story. The doctrine became, in some instances, a constitutional restraint on legislation, and in other cases a rule of construction. In Illinois up until 1955 it was provided by statute that

> "No new law shall be construed to repeal a former law, . . . as to any act done, . . . or any right accrued, or claim arising under the former law, or in any way whatever to affect any . . . act . . . done, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, as far as practicable, to the laws in force at the time of such proceeding." ILL. REV. STATS. C. 131, §4 (1953).

In 1955 this statute was amended so that it applied only to criminal statutes. ILL. REV. STATS., C. 131, §4 (1955). However, the law governing retroactive appeals of civil statutes has remained substantially the same as before 1955.

As the defendants have noted, the Illinois courts, in construing the above statute, have limited its application by holding that only "vested rights" are encompassed by its terms. The defendants have cited cases decided prior to 1955 which hold that "where a statute giving a special remedy is unconditionally repealed without a saving clause, all pending suits predicated thereon will terminate as of the date of the repeal, since there is no vested right in any statutory remedy." See *Orlicki* v. *McCarthy,* 4 Ill. 2d 342, 346 (1954) and cases cited therein.

A review of Illinois decisions, including those after 1955, reveals a spate of decisions which upon careful analysis are difficult to reconcile. The "word" formulas of "vested right" versus "strictly procedural remedy" merely bespeak the conclusion of the Court. Trends of

decisions seem to consider the basic nature of the claim as founded upon justice as substantially affecting the determination whether we are dealing with "vested right" or simply considering a specific "remedy."

The purported "express" repealing legislation in the instant case has no provision for retroactive application as to pending cases. House Bill 1856 (Act 815) provides in part:

> "Section 1. Section 25-3 of 'An Act relating to criminal law, and to repeal Acts and parts of Acts therein named,' approved July 28, 1961, is hereby repealed."

And House Bill 598 (Act 1283) provides in part:

> "Section 1-4-8 of the Ill. Mun. Code, approved May 29, 1961, as amended, is repealed."

Thus the question arises as to whether rights which have accrued under both mob violence statutes in 1966 are vested rights and therefore protected from retroactive appeal.

This Court is compelled to reach the conclusion that such rights are vested for the following reasons: First, the statutes, which are now purportely repealed by the 1967 legislation, have long been a recognized part of the legislative scheme in Illinois. Since 1887 and 1905, they have played an integral part in curbing riots and civil disobedience. They are directed not only to assisting the innocent victim through limited compensation, but more importantly they place the onus of mob destruction on both the wrongdoer and the law-abiding through general taxation. Thus, not only does the wrongdoer share the burden of his wrong, but the indifferent and law-abiding are awakened to the needs and problems arising within the community. *City of Chicago* v. *Sturges,* 222 U.S. 313 (1911). Such legislation must therefore be liberally construed to carry out the legislative intent. *Spring Valley Coal Co.* v. *City of Spring Valley,* 65 Ill. App. 571, 590-91

(1896). To now hold that an accrued cause of action is defeated by a purported retroactive repeal not only destroys the rights of innocent victims of the riots in question, but it upsets the entire legislative scheme and purpose of preventing riots in the future. This Court would be remiss in its duties if it reached this conclusion without even the slightest expressed suggestion from the Legislature that such was its intent. *Hogan* v. *Bleeker,* 29 Ill. 2d 181 (1963). See also, *Minty* v. *State,* 58 N.W. 2d 106, 112 (Mich. S.Ct. 1953).

In *Hogan* v. *Bleeker,* 29 Ill. 2d 181 (1963), the court considered the constitutional protection afforded to previously existing rights—something even more extreme than pure legislative intent. The court construed *Orlicki* v. *McCarthy,* 4 Ill. 2d 342, relied on by defendants, as a "procedural statute relating to time limitations." 29 Ill. 2d at 187. And even assuming for the sake of argument that the "mob riot" statutes are purely "procedural or remedial", the next question is whether we are dealing with a vested property right. "Remedies are the life of rights, and are equally protected by the Constitution. Deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate, unless another remedy exists or is substituted for that which is taken away." 29 Ill. 2d at 187 (citing other cases). And the Supreme Court did give attention to the running debate between the word formula of "vested right" versus "mere procedure." The court further said, referring to the rule of "vested right", that

> ". . . More recent commentators have criticized this rule as actually being the statement of a conclusion and have taken the position that the real issue is whether taking due account of prevailing economic and social conditions, the right is one which is or ought to be an appropriate subject of constitutional protection." (Citing numerous authorities) 29 Ill. 2d at p. 189.

In *Layher* v. *Chicago-Sandoval Coal Co.,* 179 Ill. App. 476 (1913) the court held that amendments to the Mining

Act—a purely statutory "cause of action"—did not preclude the "rights" arising under the statute in effect at the time of the incident. The court held that the "general" savings clause of Chapter 131, Section 4, had to be read into and be a part of the repealing act. (179 Ill. App. at p. 482). To the same effect see *Schultz* v. *Burnwell Coal Co.*, 180 Ill. App. 693 (1913), *Shinners* v. *Royal Coal and Mining Co.*, 188 Ill. App. 335 (1914). To the same effect as to causes of action based upon occurrences which take place prior to repeal but which are not filed until after repeal, see *Merlo* v. *Coal & Mining Co.*, 258 Ill. 328 (1913) at 335, citing numerous cases from Illinois and many other states. Accordingly this Court concludes that the causes of action that accrued in July, 1966 were vested rights protected by constitutional guarantees.

Second, the Court finds a common law basis for the causes of action in this case and, thus, repeal of the instant statutes incorporating such common law origins will not affect rights which have already accrued.

By Illinois statute it is provided that the common law of England is in full force in Illinois until repealed by legislative authority. ILL. REV. STATS. C. 28, §1 (1965). Thus, it is provided:

> "That the common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British Parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First, [March 24, 1606 to March 23, 1607], . . . and which are of a general nature and not local to the Kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority. (*Ibid.*)"

This Court is aware of the fact that generally the cases and text writers express the general rule that at common law there was no cause of action for personal injuries or property damages sustained by an innocent victim

at the hands of a mob insofar as the local public entities is concerned.

After careful research and reflection this Court is of the opinion that the rule as aforesaid is either incorrect or is misleading in the light of recent judicial decisions and modern realistic scholarly thinking. It is therefore the conclusion of this Court that the statute of Winchester (1285) and other similar statutes predating 1606, which permitted recovery against the municipality for injuries suffered by the individual under enumerated circumstances, are a part of the common law of the State of Illinois, which was incorporated into Chapter 38, Section 25-3, and Chapter 24, Section 1-4-8. As such, a purported repeal of these statutes could in no way affect rights which had already accrued. The rights in the instant case—at least so far as property rights—were therefore vested at the time the plaintiff was allegedly injured and his right to maintain this action is in no way affected by the repealing legislation of 1967. *Tatge* v. *Hyde,* 84 Ill. App. 2d 310 at 314-317 (1967).

A recent collection of articles in a symposium entitled "Sovereign Immunity and Public Responsibility" (1966 U. of Ill. L.F., 795 et seq.) starts with a foreward as follows: "Within a political and social system such as exists in the United States, one would think that the touchstone for the legal relationship between the citizen and the state would not be that expressed by the term 'sovereign immunity' but rather a generous theory of 'public responsibility.'" 1966 U. of Ill. L.F. at p. 793. The most recent article on the subject of mob action in a scholarly and well documented, historical and logical analysis of the social problem, expresses the thought that: "Victims of mob disorders should be entitled to compensation from local units of government independent of negligence as a matter of absolute liability imposed by statute." Sengstock: 44 Journal of Urban Law at p. 411 (1967). In coming to this conclusion the author outlines the historical explanation of "sovereign immu-

nity" as a judicially created bar and concludes that the eradication of the common law judicially erected bar should eradicate opposition to the proper solution. "The problem is one of social policy. It amounts to a balancing of interests in a complex society in which a loss may be an insurmountable burden to the individual but a comparatively light *onus* to the group." 44 Journal of Urban Law at p. 417. The author's conclusion is succinct and most persuasive:

> "There is a substantial need to indemnify victims of mob disorders. In part, that need can be satisfied by current developments in tort law. Sovereign immunity is playing its finale. Fundamental principles of the common law warrant the conclusion that the injured has a right to sue a municipal corporation for damages committed by a mob when the local unit of government acts heedlessly in the face of knowledge of the potential dangers to the victim. *However, justice requires that the entire society of a metropolitan area bear the responsibility for injuries produced by riots even when the government is not negligent.* This demand of justice can be fulfilled by statutes imposing absolute liability on local units of government to compensate the victims of mob disorders." (emphasis added). 44 Journal of Urban Law, at pp. 431-432.

In a recent article entitled "Trends in Municipal Liability: Riot Damages" the authors express these thoughts in surveying the American scene of mob riots in 1966:

> "One might also expect that due to the increasing number of cases abrogating and whittling away the doctrine of sovereign immunity, it may not be too long before we have case decisions in the various states—even in the absence of statutory provision—holding that a municipality is liable for damage and injury caused by riots and mobs. This is especially conceivable in view of the fact that possibilities of mob action, mob violence, rioting and tumultous as-

semblage have again become an increasing danger and menace to the safety and welfare of the citizens of the community not only because of racial unrest and tension but also as a sociological condition of society." May, 1967 Insur. Law Journal at p. 288.

The biting observation of the authors find dramatic support in the excesses of the younger generation such as at Lake Geneva, Wisconsin or Fort Lauderdale, Florida. The authors continue with a prophesy:

> "Therefore, one may find the courts more and more willing to hold that a municipality entrusted under the police power with the preservation of the safety, health and moral welfare of the community should be responsible for the failure to protect its citizens and property through every available means."

The writers of this article therefore hazard a guess that the "trend toward municipal liability for damages caused by riots and mob action will continue by the enactment of more statutes *and by the evolvement of more case law creating such liability even in the absence of statutes.*"

The Illinois history of abrogation of the doctrine of "sovereign immunity" is well known. Before and after *Mollitor,* (18 Ill. 2d 11, (1959)) the record is quite clear. For full discussion see 1966 U. of Ill. L.F. at p. 930-933. The tort immunities of counties as exemplified in the early case of *Hedges* v. *County of Madison,* 6 Ill. (1 Gilm.) 567 (1844) was part of the mainstream of sovereign immunity for "governmental torts." See 1966 U. of Ill. L.F. at pp. 810, et seq.; 1966 U. of Ill. L.F. at p. 930 et seq.

The judicial repudiation of the doctrine of sovereign immunity for governmental action changes the basic nature of the "mob riot" statutes. When first enacted in 1887 they were unique and contrary to the general philosophy of liability of municipal corporations. After *Mol-*

litor these statutes are now rooted in a general scheme of municipal responsibility. Claims that arose under the auspices of the statutes are not the pure "statutory remedy" that the Legislature created by legislative declaration without regard to the social conditions that lead to the enactment. But cognizance must be taken of the fact that the oft proclaimed principle that no cause of action for mob violence exists independent of statute is a reflection of the field of public entity law existing when it was also accepted that public entities were not liable for injuries caused by governmental activity.

Our Illinois Constitution of 1870 in the Bill of Rights gives sage advice—and warning to our citizens and the bodies public. "A frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty." Art. II, Sect. 20. In the preamble to the Constitution of 1870 some of the purposes of the establishment of this organic law of the land were "...establish justice, insure domestic tranquility..."

These phrases are often so deeply imbedded in our basic concepts of civil government that we tend to overlook their full significance.

Yet in *City of Chicago* v. *Manhattan Cement Co.*, 178 Ill. 372 (1899) in seeking to sustain the validity of the original act of 1887 the attorneys did seek recourse to the fundamental principles of the constitution—domestic tranquility and the protection of property. 178 Ill. at p. 374.

One of the basic elements of the social compact was that citizens banded together and formed a government that would protect their physical safety and their property. When the government fails to achieve the purpose of this compact, does not justice require compensation of the injured innocent victim who has suffered at the hands of a mob? And a claim that has arisen under such statutes asking for the justice decreed by this statute should

not be treated as a statutory remedy without a basis in the social evils sought to be eradicated or the unfortunate consequences alleviated by the legislative action.

Finally, the famous case of *Schuster* v. *City of New York*, 5 N.Y. 2d 75, 180 N.Y.S. 2d 265, 154 N.E. 2d 534 (1958), and especially the reasoning of the dissenting opinion of Justice Belduck of the Appellate Division, reported in 286 App. Div. 389, 143 N.Y.S. 2d 778 (1955) (whose dissent was in fact sustained by the New York Court of Appeals) casts light upon the true nature of the common law right of protection of physical safety by proper police action that may be claimed by an individual citizen and indirectly it casts its reflection upon the duties owed by the community to all citizens, regardless of a request for police protection. In England and Europe generally, communal liability for mob violence is based upon a repudiation of the "common law" and: "...it would seem that in a period of unrest the community rightly should bear the burden of damage done by a band of unknown individuals." 44 Urban L. J. at p. 421. See also "Communal Liability for Mob Violence", 49 Harv. L. Rev. 1362, at 1369 (1936); 1966 U. of Ill. L.F. at pp. 1025, 1038. It would be ironic that European systems granting the private citizen the right of redress against the government should be more democratic than our own democracy. 1966 U. of Ill. L.F. at p. 829, note 3.

6. *No Legally Effective Repeal in 1967.*

Third, examination of the purported repealing legislation read in the light of other legislation enacted by the same General Assembly in 1967 and signed by the governor fails to convince this Court that there was an effective repeal of Chapter 24, Section 1-4-8. On August 21, 1967, the governor signed House Bill 598 which purportedly repealed Chapter 24, Section 1-4-8. However, on September 7, 1967, the governor signed into law House Bill 958, which *amended* Chapter 24, Section 1-4-8.

Illinois does not have a congressional record or any kind of detailed reports by committees, etc. The *clearest* evidence is that of the action by the governor.

Does the action by the governor in approving or vetoing bills passed by both houses of the Assembly constitute part of the legislative process in enacting bills? Our constitution says that every bill passed by the General Assembly shall before it becomes a law, be presented to the governor. Art. V, Sect. 16 of the Ill. Constitution of 1870 and this section enlarges upon Art. IV, Sect. 13, pertaining to passage of bills.

Under the most *recent* cases that deal *squarely* with the legal effect of the governor's action in approving or vetoing bills, it is recognized that in so acting the governor is acting in a legislative capacity—though limited as it may be. "For that purpose he is a part of the legislative department." *Williams* v. *Kerner,* 30 Ill. 2d 11, 14 (1963). See also *People ex rel. Peterson* v. *Hughes,* 372 Ill. 602, 607 (1940); *Fergus* v. *Russell,* 270 Ill. 304, 349 (1915).

In *Williams* v. *Kerner,* the court quoted at length from U. S. Supreme Court cases in recognizing that the governor's action in either approving or vetoing bills passed by both Houses of a State Legislature is *realistically* an essential part of the process of *effective* legislation.

In *People ex rel. Peterson* v. *Hughes,* 372 Ill. 602 (1940) our Supreme Court said:

> "The Constitution imposes the duty upon the legislative department to create and enact legislation, and the presentment of bills to the Governor for his approval is one of the necessary steps in the exercise of the legislative function. The duty of the Governor does not begin until the bill has been presented to him by the General Assembly." 372 Ill. at p. 607.

This is sound constitutional doctrine. The reason lies in the basic scheme of checks and balances provided by our constitution in order to

> "...prevent as far as possible, the evils that flow from hasty and ill-considered legislation. The provision was one of the constitutional checks and balances exercised by one department of government over the other. It is a basic fact of our scheme of government and is zealously guarded by the courts." 372 Ill. at p. 607.

Apparently the problem of preventing hasty and ill-considered legislation is not new to Illinois assemblies or Illinois courts called upon to interpret and constitutionally evaluate the action of "multi bill burdened" assemblies.

In *People* v. *Hatch,* 33 Ill. 9 (1863), construing provisions of the *1848* Constitution the court in the course of a lengthy opinion (about 148 pages) resolved a bitter conflict between the Governor and the Assembly. In the process of reviewing the 1848 constitutional provisions the court spoke as follows:

> "The convention which framed our Constitution designed to provide for the enactment and enforcement of salutary laws in the mode best calculated to promote the general welfare. They supposed, as one of the means of best attaining this end that the executive of the State should not only be intrusted with the enforcement of all laws, *but should also be vested with a voice in their adoption....* But to prevent the evils of hasty, ill considered legislation, they conferred upon the governor *the power to arrest the passage* of a bill until his objections could be heard, and the bill be again considered and adopted." (Emphasis added.) 33 Ill. at p. 136.

Our Supreme Court has recognized that the closing days of a session of the Assembly are the days when the action of the two Houses is pressured by the many bills clamoring for and receiving action by voting—limited though the time may be. And it is common knowledge that the General Assembly has followed the practice of passing many bills in the closing hour of the session.

For this reason, it is the responsibility of the governor to veto undesirable legislation and sign into law those bills which will best serve the interests of the State. *People* v. *Hughes*, 372 Ill. 602, 611 (1940).

In the 1967 session countless bills received final approval by the two Houses during the last two weeks of the Assembly and in fact so numerous were such bills that the Governor did not complete his action on all bills presented to him until the latter part of September, 1967.

In the instant case the Governor signed into law two bills directly affecting Chapter 24, Section 1-4-8, which are totally inconsistent. Under such circumstances it is a rule of construction that "if two amendments are so inconsistent that both cannot operate and be given effect, the later amendment in point of time controls." *S. Buchsbaum & Co.* v. *Gordon*, 389 Ill. 493, 499 (1945). It is a further rule of construction that "where acts are passed at the same session, containing conflicting provisions, the whole record of the legislation will be examined in order to ascertain the legislative intent which, if ascertained, must be given effect, regardless of priority of enactments." *S. Buchsbaum & Co.* v. *Gordon, supra*, at 500.

As this case indicates, there are few mathematically precise formulas for determining legislative intent. Whatever canons of construction exist they are only tools to aid a court in reaching the proper conclusion as to the true legislative intent. In analyzing the bills in question and the action of the Governor concerning amendments of Chapter 24, Section 1-4-8, this Court is unable to focus on any clear intent of the two Houses of our Assembly. On the contrary, assembly action concerning the above amendments is indecisive. The only clear beam in this morass is the single and undisputed fact that the Governor signed House Bill 958 on September 7, 1967, which recognized the continuing vitality of the statute in question, some seventeen days *after* he signed the repealing legislation. The only conclusion the Court can reach is that the Governor, acting in his legislative capacity, preserved Chapter 24, Section 1-4-8.

To reach any other conclusion this Court would have to disregard and ignore the acts of the Governor under the cases cited that, his conduct in this capacity is part of the legislative process. If he intended to repeal the statute by signing House Bill 598 on August 21, 1967, he certainly intended to revitalize or reinstate it subsequently by signing House Bill 958 on September 7, 1967.

Chapter 24, Section 1-4-8 was on the statute books of Illinois in various forms for eighty years before the Governor acted upon the pertinent bills submitted to him by the 1967 Assembly. This statute, as shown by reported decisions, has played an important role in deterrence, in fixing responsibility and in compensating or at least alleviating the injury or damage caused by mobs to innocent persons. Whether this statute is to be repealed should be left to future action by the Assembly and the Governor where no doubt will exist. The judiciary should not interfere with a clear cut decision in the legislative process to be made in the future by an inopportune decision in the case at bar, a decision which was neither intended nor contemplated by the Governor when he acted in this matter on September 7, 1967, when he approved and signed House Bill 958.

Furthermore, this statute, dating back to 1887, was "not solely a penal statute and its thrust is compensatory, preventive and remedial." *Ray* v. *Hampton,* 226 A. 2d 870 at 872 (N.H. 1967). This characterization by such a recent decision explains the action of the Governor in seeking to reinstate this wise and just legislation.

After reaching this conclusion with respect to Chapter 24, Section 1-4-8, the Court is also compelled to conclude that the repeal of Chapter 38, Section 25-3, by House Bill 1856 approved and signed by the Governor on July 31, 1967 which is applicable to the County is unconstitutional.

The repeal of this statute would *arbitrarily* foreclose all persons injured by mob violence from obtaining relief against the County. More particularly, persons liv-

ing in cities, towns or villages of 5,000 persons or under, or in unincorporated areas would be arbitrarily foreclosed from obtaining any form of relief whatever, thereby denying them equal protection of the law under both the Illinois Constitution and the Federal Constitution.

It would further violate Section 22 of Article IV of the Illinois Constitution in that it would constitute special legislation.

Directly in point on this issue are the recent decisions of *Harvey* v. *Clyde Park Dist.*, 32 Ill. 2d 60 (1965) and *Hutchings* v. *Kraject*, 34 Ill. 2d 379 (1966). In the *Harvey* decision action was instituted on behalf of a minor to recover damages for injuries alleged to have been caused by the negligence of the Clyde Park District in maintaining its playground facilities. Based on an immunity statute pertaining to park districts in such cases, the suit was dismissed and an appeal taken directly to the Illinois Supreme Court. ILL. REV. STATS., C. 105, §12.1-1 (1963).

Plaintiff argued that in light of the statutory pattern the statute in question which purported to bar recovery, violated the prohibition against special legislation contained in section 22 of Article IV of the Illinois Constitution. That section provides: "The general assembly shall not pass local or special laws in any of the following enumerated cases . . . Granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever."

The Court stated that the "determinative question under section 22 of article IV is whether the statutory classification is rational." (32 Ill. 2d at 64). The Court further stated:

> "Nor is it significant that the quoted provision of section 22 of article IV has been held inapplicable to municipal corporations generally, and park districts in particular. (See *e.g. Kocsis* v. *Chicago Park District*, 362 Ill. 24). For more is involved here than

just the classification of governmental units. Those persons who are injured by the negligence of particular governmental units are also classified, and section 22 of article IV prohibits the granting of 'special or exclusive' privileges to individuals. 'This provision prevents the enlargement of the rights of one or more persons in discrimination against the rights of others.' *Marallis* v. *City of Chicago*, 349 Ill. 422, 427.

". . . And to the extent that recovery is permitted or denied on an arbitrary basis, a special privilege is granted in violation of section 22 of article IV." 32 Ill. 2d at 65.

The Court concluded that because cities, villages, school districts, forest preserve districts and the State, as well as park districts, all maintain recreational facilities available for public use, any variance in the degree of recovery permitted a plaintiff, depending only and simply on the governmental division sued, was arbitrary and unconstitutionally discriminated against the plaintiff. 32 Ill. 2d at 67.

In the *Kraject* case, the plaintiff challenged the constitutionality of a 1961 amendment to the Counties Act (ILL. REV. STATS., C. 34 §301.1 (1966)), immunizing counties for liability for personal injuries, property damages and death caused by the negligence of their agents. Plaintiff filed this action against the County of Richland, certain of its employees and two surgeons alleging negligence in that a surgical sponge was left in her chest following an operation in the Richland Memorial Hospital, a hospital maintained and operated by the county. The action was dismissed by the circuit court on grounds that the county was immune from suit. As in the *Harvey* case, the plaintiff attacked the constitutionality of the immunity statute, asserting that it constituted special legislation violative of Section 22 of Article IV.

The thrust of the county's argument was that counties, like townships, are quasi-corporations, established by the

State without any vote or consent of the inhabitants thereof and may, therefore, bear a classification different from municipal corporations such as cities and villages which exist by direct request or consent and for the advantage and convenience of the residents of the area. The Court rejected this argument stating: "The infirmity of this legislation lies in classifying governmental units as such, without regard to similarity of function." 34 Ill. 2d at 382.

As in the *Harvey* and *Kraject* cases, so here, the functions pertaining to the City are identical to those of the County. To thus immunize the County from all liability for mob violence is arbitrary and would discriminate against a certain segment of the populace, in violation of the equal protection of the law and also in violation of Section 22 of Article IV as a special law. The repeal of Chapter 38, Section 25-3 is unconstitutional. In *Skinner* v. *Anderson,* Docket No. 40558, Illinois Supreme Court opinion filed December 1, 1967, Mr. Justice Schaefer said (p. 3 of slip opinion) in holding Section 29 of the Limitations Act unconstitutional:

> "Sect. 22 of Article IV does not prohibit legislative classification. It does, however, require that the classification be reasonably related to the legislative purpose. And where that relationship was non-existent the statute has been held to contravene the constitutional prohibition. (See *e.g. Harvey* v. *Clyde Park District,* 32 Ill. 2d 60; *Grasse* v. *Dealers Transport Co.,* 412 Ill. 179; *Marallis* v. *City of Chicago,* 349 Ill. 422). That the statute benefits all architects and construction contractors is significant only if the benefits conferred upon them are not denied to others similarly situated. As this Court held with respect to Section 22 of Article IV: 'That the statute operates uniformly upon all members of a class created as the beneficiaries of the act is not the sole test to be applied, but in order to avoid the constitutional prohibition last above quoted, *it must also appear there*

is a sound basis, in reason and principle for regarding the class of individuals as a distinct and separate class for the purpose of the particular legislation." (Emphasis added).

This recent invalidation of a "special Act" granting immunity to architects and contractors from liability upon causes of action that do not accrue within a period of four years after the architect or contractor performed their services is to be contrasted with the outright repeal in 1967 attempting to give counties *total immunity* from liabilities where in substantially the same circumstances, the city over 5,000 population "retains" its liabilities.

There is no basis in reason and principle for regarding counties as a "distinct and separate" class for the purpose of mob riot legislation.

The two rulings of our Supreme Court (*Harvey* and *Kraject*) in concluding that legislative attempts to "confer immunities" upon specific public entities violated basic constitutional guarantees was simply another facet of the work begun by the Court in the landmark *Mollitor* case. The revision of the entire body of the law of liability of public bodies to personally injured or property damaged innocent citizens must also be considered in the light of modern scholarly thinking that:

"The time will come when we shall perceive more clearly that governmental units should often be liable where private parties would not be and should not be liable . . . A large enough government unit is the best of all possible loss spreaders, especially, perhaps, if its taxes are geared to ability to pay. *The basic fact,* which so far has been given too little heed, will in time lead us to see that the *basis for government liability should not be fault but should be equitable loss spreading.*" (Emphasis added). Davis: "Administrative Law Treatise," Vol. 3, Sect. 25.17, pp. 503-504.

A statute acting as a repealer must be "non arbitrary" in its operation.

The case at bar is *not* questioning the authority of the legislature to abolish or limit by a *non arbitrary statute,* a right unknown to common law which it had previously created. *Heckendorn* v. *First Nat'l Bank,* 19 Ill. 2d 190, at 194 (1960). Under the *Kraject* case the repealer was an "arbitrary" attempt to immunize the county. And the right was not unknown to the common law. The cases clearly hold that a "repealer" Act must be subject to satisfying constitutional guarantees before it may be valid. If it violates constitutional prohibitions, it is void. If it is void, it will not operate to repeal the pre-existing valid statute. See *People* v. *Schraeberg,* 347 Ill. 392, 394 (1932); *People* v. *Schaeffer,* 310 Ill. 574, 584 (1942); *Hendricks* v. *Gamble,* 217 Ill. App. 422, 426 (1920); 34 Ill. Law & Practice, p. 82, Sect. 91; 50 Am. Jur. p. 529 et seq. Sects. 521-523; 82 C.J. S. p. 473 et seq., Sect. 281.

CONCLUSION

For each and all of the aforegoing reasons the Court finds that the motions of the County and the City to dismiss must be overruled.

Counsel will prepare appropriate orders.

January 12, 1968

/s/ Abraham W. Brussell
Abraham W. Brussell
Judge of the Circuit Court
of Illinois for Cook County
Courtroom 2410
Chicago Civic Center
Chicago, Illinois

IN THE
SUPREME COURT OF ILLINOIS

L. C. Shelton, et. al.,
Plaintiffs-Appellees,
vs.
City of Chicago, a Municipal corporation and the County of Cook, a body politic and corporate,
Defendants-Appellants.

No. 41336

ORDER

This cause coming to be heard on motion of Plaintiffs-Appellees, L. C. Shelton and Americo Detres, Sr. as father and natural guardian of Americo Detres, Jr., a minor, to certify that a question under the United States Constitution was presented and necessarily passed upon, due notice having been given, and the Court being fully advised in the premises;

It Is Hereby Ordered To Be Certified and made a part of the record that the Plaintiffs in this Appeal both in their brief and on oral argument claimed a right under the Fourteenth Amendment of the Constitution of the United States, and in particular claimed that the Due Process Clause of the Fourteenth Amendment prohibits the retrospective application of a repeal to defeat causes of action for Mob Action arising prior to the enactment of the repeal which claim was material to the determination of this case and necessarily passed upon by the Supreme Court of Illinois, and which was determined adversely to the Plaintiffs'Appellees.

/s/ Walter O. Schaefer
Justice of the Supreme Court of Illinois

August 15, 1969
Epton, McCarthy, Bohling & Druth
69 West Washington Street
Chicago, Illinois 60602
STate 2-3800
File No. XA-66-37 (ekm)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 489

L. C. SHELTON, AMERICO DETRES, SR., AS FATHER AND NATURAL GUARDIAN OF AMERICO, JR., A MINOR,
Petitioners,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION, AND COUNTY OF COOK, A BODY POLITIC AND CORPORATE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION.

EDWARD V. HANRAHAN,
State's Attorney of Cook County, Illinois.
500 Chicago Civic Center,
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DANIEL P. COMAN,
Chief of the Civil Division,
DEAN H. BILTON,
Assistant State's Attorney,
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Assistant State's Attorney,
Of Counsel.

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BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion is correctly printed as Appendix B to the Petition for Writ of Certiorari. It is now in printed form at 148 N. E. 2d 121.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

The question presented is correctly set forth in the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

These are correctly stated in the Petition.

STATEMENT OF THE CASE.

The statement of the petitioners is correct. However, it should be noted that the Petitioners' complaints were based solely upon the operation of the Mob Action Statutes. These complaints did not allege a common law tort action against the Respondent County of Cook. There were no allegations in these complaints that Respondent County of Cook acted negligently or willfully to the detriment of the petitioners.

REASON FOR DENYING THE WRIT.

The Decision of the Illinois Supreme Court Is Consistent With Applicable Decisions of This Court.

In July 1966, the Petitioners were injured by mob action and at that time, they had available to them a statutory remedy of filing suits against the Respondents City and County. By virtue of the doctrine of absolute liability imposed by these statutes, the Petitioners could recover their damages. In August 1967, these statutes were repealed and that repealer has been held to operate retroactively. The Petitioners claim that this retroactivity has caused them to be unconstitutionally deprived of a vested right. This claim is without merit in that there is no vested right in any given mode of procedure. (*Denver & Rio*

Grande W. R. Co. v. *Brotherhood of Railway Trainmen,* 387 U. S. 556, 563.)

This Court has held that when statutory remedies are repealed without a savings clause, the repealer operates retrospectively so as to defeat causes of action already commenced. "And such laws operating with that effect have been upheld as against all objections on the ground that they deprive parties of vested rights or impair the obligation of contracts." (*Ewell* v. *Daggs,* 108 U. S. 143, 150.) Following this rule, other Courts have come to the same conclusion. In *National Carloading Corp.* v. *Phoenix-El Paso Express,* 142 Tex. 141, 176 S. W. 2d 564, 569, Cert. Den. 322 U. S. 747, that Court said,

> "The Courts are generally agreed that rights of action based upon purely statutory grounds may be abolished by the legislature even after they have occurred." (Cited cases including *Ewell* v. *Daggs.*)
>
> ". . . We think it therefore becomes evident that the plaintiff does not possess such a vested right as to come within the inhibition of the Fifth Amendment. Such a right must be something more than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from the demand of another. If, before rights become vested in particular individuals, the convenience of the State induces amendment or repeal of the laws upon which they are based, these individuals are left without any remedy at law to enforce their claims; and if final relief has not been granted before the repeal goes into effect it cannot be granted thereafter, even if a judgment has been entered and the cause is pending upon appeal. The general rule is that when such law is repealed without a saving clause, it is considered, except as to transactions past and closed, as though it had never existed."

In addition to the foregoing general principles, this Court has specifically held that mob action remedies, such as the ones in question, are to be treated in the same manner as other statutory remedies. The case of *Louisiana* v. *Mayor of New Orleans*, 109 U. S. 286, was a mandamus suit to force the City of New Orleans to levy taxes at an old tax rate sufficient to pay the petitioners' judgments for mob action damages. The rate was lowered by the legislature subsequent to the entry of these judgments, and the judgments could not be satisfied by the new rate, whereas they could have been satisfied by the old rate. This Court in upholding this legislation said:

> "The right to reimbursement for damages caused by a mob or riotous assemblage of people is not found upon any contract between the City and the sufferers. Its liability for the damages is created by a law of the legislature, and can be withdrawn or limited at its pleasure." (109 U. S. 286, 287.)

Mr. Justice Bradley, concurring, said:

> "I concur in the judgment in this case on the special ground that remedies against municipal bodies for damages caused by mobs or other violators of law unconnected with the municipal government are purely matters of legislative policy, depending upon positive law, which may at any time be repealed or modified, either before or after the damage has occurred, and the repeal of which causes the remedy to cease. In giving or withholding remedies of this kind, it is simply a question whether the public shall or shall not indemnify those who sustain losses from the unlawful acts or combinations of individuals; and whether it shall, or shall not do so, is a matter of legislative discretion . . . And, as the judgments in the present case were founded upon a law giving this kind of remedy, I agree with the Court; that any restraint on taxation which may affect the means of enforcing them is within the constitutional powers of the legislature. Until the claim is reduced to pos-

session, it is subject to legislative regulation." (109 U. S. 287, 291.)

The respondent submits that the *Mayor of New Orleans* case is controlling in the instant case.

The petitioners claim to have been deprived of a right of redress without the substitution of any "effective" remedy. (Petition, p. 8.) This argument ignores the fact that the basic remedy given to anyone who is injured through wrongful conduct is a tort suit. Obviously, the petitioners have this remedy and can sue the persons who did the damage to the petitioners or who aided in any way to this injury.

The concurring opinion in the *Mayor of New Orleans* case (109 U. S. 286, 291), specifically exempts this common law remedy from the retroactive operation of the repealer of the statutory remedy. Whether this remedy is "effective" depends upon the usual problems connected with tort litigation. If the tortfeasor is identified, if there is sufficient evidence to prove the act, if the defendant is solvent, then the remedy is "effective". However, these are the problems of all plaintiffs, not just those injured in riots. What the instant plaintiff, the petitioners, had and lost was a special gift—a municipal corporation standing as an insurer to reimburse this particular category of injured persons. Clearly, the petitioners have no vested constitutional right to a continuation of this gift.

CONCLUSION.

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari to the Illinois Supreme Court be denied.

Respectfully submitted,

EDWARD V. HANRAHAN,
State's Attorney of Cook County, Illinois.

DANIEL P. COMAN,
Chief of the Civil Division,

DEAN H. BILTON,
Assistant State's Attorney,

THOMAS E. BRANNIGAN,
Assistant State's Attorney,

Of Counsel.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT.

BRIEF FOR RESPONDENT CITY OF CHICAGO IN OPPOSITION.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

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BRIEF FOR RESPONDENT CITY OF CHICAGO IN OPPOSITION.

OPINION BELOW.

The opinion of the Supreme Court of Illinois is available in 42 Ill. 2d 468, and 148 N. E. 2d 121, as well as in the Petition for Writ of Certiorari, Appendix B.

QUESTION PRESENTED.

Whether the Due Process Clause of the Fourteenth Amendment prevents a state legislature from repealing a special statutory remedy with the effect of terminating pending litigation prior to judgment.

REASONS FOR DENYING THE WRIT.

I.

The Judgment of the Supreme Court of Illinois Was Correct.

At the time of instituting suit for the collection of tort damages in the Circuit Court of Cook County, petitioners had two alternative courses of action: either they could have sued the persons responsible for any alleged damage on the basis of their common law liability, or they could have sued the governmental units in which the alleged damage took place under a special statutory remedy making municipal corporations liable for "mob violence" damage. Petitioners chose the latter course, suing under the special statutory remedy. While the suit was pending, the Illinois General Assembly repealed, without a saving clause, the special statutory remedy.

The Supreme Court of Illinois, in an opinion by Mr. Justice Walter V. Schaefer, refused to accept petitioners' contention that:

> ". . . because their injuries had occurred and their pending actions had been commenced while the repealed statutes were in effect, their rights were vested, and could not, as a matter of constitutional law, be retroactively defeated by the repeals. The remedy sought to be asserted is clearly, in the language of our earlier decisions, a special statutory remedy. There is in these cases no element of contract, nor is there any suggestion of conduct by the plaintiffs undertaken in reliance upon the repealed statutes. . . . The legislature, which for a time had permitted a remedy against subordinate governmental units for damage resulting from mob violence, has withdrawn remedy." (42 Ill. 2d 468, 474; 148 N. E. 2d 121, 124; Pet. Appendix B, p. 8a.)

Mr. Justice Schaefer, in the passage quoted, states the law succinctly and accurately. In *Flanigan* v. *Sierra County,* 196 U. S. 553 (1905) at 560, this court recognized the same principle:

> "The general rule is that powers derived wholly from a statute are extinguished by its repeal. Sutherland on Statutory Construction, § 165. And it follows that no proceedings can be pursued under the repealed statute, though begun before the repeal, unless such proceedings be authorized under a special clause in the repealing act. 9 Bacon's Abridgement, 226."

Petitioners cite in support of their position the case of *Gibbes* v. *Zimmerman,* 290 U. S. 326 (1933). That case more clearly supports respondent's position than petitioners' inasmuch as it clearly states that there is no property right in any particular form of remedy; only the substantial right to redress is protected by the Fourteenth Amendment. This is precisely what Mr. Justice Schaefer was responding to when he wrote (42 Ill. 2d 468, 475; 148 N. E. 2d 121, 124; Pet. App. B, p. 9a):

> "One who has suffered riot damage has a remedy against the persons who inflicted the injury. That remedy may be of little practical value in many cases, but the same is true of the victim of a rape, a robbery, or a hit-and-run driver. It is hard to say that one group of innocent victims of criminal conduct is more deserving of compensation from the community than the other."

Again, petitioners cite *Forbes Pioneer Boat Line* v. *Board of Commissioners,* 258 U. S. 338 (1922). But at issue there was "a right to recover money that is *due when the act is passed*" (Emphasis supplied; See Petition, p. 8 for complete quote). Surely the fact that money was already *due* is relevant to the question of whether a right has "vested;" and since there had been no judgment in the instant case, *i.e.,* nothing was due, this case also provides authority for respondent's position, rather than petitioners'.

Petitioners are not warranted in asserting, as they do at page 9 of their Petition, that the intermediate appellate court of Ohio in *Pickering* v. *Pickering*, 43 Ohio App. 401, 183 N. E. 301 (1930), relied even "in part" on the Due Process clause. What is certain in that decision is that the Ohio constitution prohibited *any* retroactive laws, and that, as a matter of Ohio law, a right of action for tort was a property right (183 N. E. at 303). Similarly, there is no hint, in *Minty* v. *State*, 336 Mich. 370, 58 N. W. 2d 106 (1953) that there was any issue of due process; as a matter of Michigan law, the court there reached the same result at that reached in *Pickering*. Both cases, therefore, turn on local law, not on the requirements of due process.

We conclude, as a result, that the judgment of the Supreme Court of Illinois is correct.

II.

The Petition for Writ of Certiorari Presents No Substantial Federal Issue.

Petitioners do not argue that the repeal of the special statutory remedy involved in this suit is invalid on its face; rather, the claim of invalidity affects only the relatively small number of litigants whose suits were pending at the time of repeal. Thus, the issue of whether this group of Petitioners alone should be permitted to enjoy a special statutory remedy when they already have a common law remedy can hardly be said to present a "substantial" issue.

Moreover, the issue is one that has clearly been foreclosed by prior decisions of this Court. In *Louisiana* v. *Mayor of New Orleans*, 109 U. S. 285 (1883), Mr. Justice Field, writing for the Court, observed at 287 that:

"The right to reimbursement for damages caused by

> a mob or riotous assemblage of people is not founded upon any contract between the city and the sufferers. Its liability for the damages is created by a law of the legislature, and can be withdrawn or limited at its pleasure."

The opinion goes on, in its concluding sentence, to distinguish between a special statutory remedy, which was before the Court, and the common law remedy, which was not. Mr. Justice Bradley, concurring, was even more explicit in his statement of the law, at 291:

> ". . . [R]emedies against municipal bodies for damages caused by mobs or other violators of law unconnected with the municipal government, are purely matters of legislative policy, depending upon positive law, which may at any time be repealed or modified, either before or after the damage has occurred, and the repeal of which causes the remedy to cease. In giving or withholding remedies of this kind, it is simply a question whether the public shall, or shall not, indemnify those who sustain losses from the unlawful acts or combinations of individuals; and whether it shall, or shall not, do so, is a matter of legislative discretion. . . . Until the claim is reduced to possession, it is subject to legislative regulation."

He, too, distinguished between "this kind of judgment, now under consideration, and other judgments for claims based upon the absolute right of the party" (at 291).

This rule has been consistently followed by this Court and by other federal courts, see, *i.e., U. S.* v. *Weekly Publications, Inc.,* 144 F. 2d 186 (2d Cir., 1944) in which Judge Augustus Hand wrote, at 188:

> "The relator acquired no vested right prior to the date of the amendment. His privilege of conducting the suit on behalf of the United States and sharing in the proceeds of any judgment recovered, was an award of statutory creation which, prior to final judgment, was wholly within the control of Congress."

See also *Flanigan* v. *County of Sierra*, 196 U. S. 553 (1904); *U. S.* v. *Hammond*, 99 F. 2d 557 (5th Cir., 1938); *Murray* v. *Homestead Value Mfg. Co.*, 84 F. Supp. 572 (1947); *Salt Co.* v. *East Saginaw*, 13 Wall. 373, 80 U. S. 373 (1871).

We can only conclude, from this abundant authority, that the issue raised by Petitioners is no longer open to question and that, therefore, there is no substantial federal question.

CONCLUSION.

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari to the Supreme Court of Illinois be denied.

Respectfully submitted,

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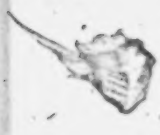
September 18, 1969.



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Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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IN THE

SUPREME COURT OF THE UNITED STATES

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Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioners submit this reply brief to respond to arguments contained in the separate briefs filed by the City of Chicago and County of Cook. No question has been raised concerning the question presented, jurisdictional basis or statement of the case. This brief is therefor limited to the point argued by both defendants that the decision of the Illinois Supreme Court is consistent with decisions of this Court and further to the argument by the City of Chicago that no substantial federal issue is involved.

I.

The Decisions Cited By Defendants Do Not Support The Retroactive Applicability of the Repeal.

Both Defendants rely upon the decision in *Louisiana* v. *Mayor of New Orleans,* 109 U.S. 285 (1883) and in particular the concurring opinion. In that case the Court refused to allow the issuance of a writ of mandamus to compel a tax levy to satisfy claims of persons who obtained judgments for damages caused by mob action. The Court was not called upon to examine any repeal of the statute. While the writ was not issued, the validity of the judgments was affirmed at 109 U.S. 289:

> ". . . The judgments may also, perhaps, be best used by the relators or their assignees as offsets to demands of the city: at least it is possible that they may be available in various ways. . . ."

The decision was predicated upon the determination that the judgments were not contracts, and to that extent it preserved the then sanctity of contractual rights over other rights. Petitioners assert that the statements by the Court relating to the power of a state to withdraw a remedy are *dicta* and further are not reflective of the concept of due process developed in the present century. The due process clause was referred to by Justice Harlan in his dissent in which he concluded at 109 U.S. 296:

> ". . . If this be not a deprivation of property without due process of law, it is, I think, difficult to conceive of a case involving such a deprivation."

The Respondents here have sought to invoke categories without meaning. Specifically the label of special statutory remedy has been used. Such a label is without substantive meaning or support in the case law. This Court consid-

ered a remedy based solely on a statute in *Ettor* v. *Tacoma*, 228 U.S. 148 (1912). There the Plaintiffs sought recovery under a statute granting compensation for damages caused by street grading. The case is substantially identical to the Petitioners' claim here in that the right to compensation was held not to exist at common law and was predicated solely upon the statute. That portion of statute relied upon was repealed while the case was pending. This Court held that the plaintiffs had a vested property right which could not be defeated. The Court further distinguished the case of *Louisiana* v. *New Orleans*, 109 U.S. 285 *supra*, stating at 228 U.S. 157:

> ". . . That case merely held that a judgment against the city under a statute for damage to private property inflicted by a mob did not constitute a contract, the obligation of which had been impaired by the repeal of a statute under which the city might have been compelled to levy a special tax for its satisfaction. The case turned upon the distinction between liability for a tort and liability under a contract."

No case has been cited by Defendants which upholds the repeal of a remedy against a governmental body. The statement by the City of Chicago concluding that the issue is no longer open to question because of "this abundant authority" is at best a complete misinterpretation of the issue. It is not supported in any case cited. Similarly it is difficult to conceive how the Defendants can in good faith assert that the requirement of the substitution of an *effective* remedy has been met by allowing the possibility of a tort action against the person inflicting injury.

II.

The Rights of Plaintiffs are Substantial.

At page four (4) of its brief the City of Chicago argues that since the repeal affects "only a relatively small number of litigants" the issue cannot be said to be "substantial." The preservation of constitutional rights should not depend on mathematical calculations. Even if only one person were involved he is entitled to constitutional protection under our laws. Here, however, the City ignores its own affidavit that over 200 cases are pending. It further disregards the fact that the case was accepted by the Illinois Supreme Court as a case of "extraordinary importance" on motions presented by it and the county.

Conclusion

Petitioners pray that the Petition for a Writ of Certiorari be granted and judgment below reversed.

Respectfully submitted,

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